THE ECCLESIASTICAL JURISDICTION IN ENGLAND.

PREVIOUS to the invasion of William the Conqueror the ecclesiastical jurisdiction in England was not at all clearly defined. Under the protection, and, as protection implies jurisdiction, under the jurisdiction of the bishops were the following: sacred persons and sacred things. Among the former were included men in orders, monks and nuns; and among the latter: churches and church-yards, books and furniture of churches, sacraments, ecclesiastical and marital rituals. So far as can be found, there were not at that time any separate ecclesiastical courts. The bishops, with the assistance of archdeacons and deans, exercised their ecclesiastical jurisdiction through the ordinary gemotes of the hundred and shire. Neither had they developed any procedure that was distinctively their own — in England they used the common law procedure as on the continent they used the civil law procedure.

Ecclesiastical procedure was modified very greatly as a result of the conquest. This is accounted for in large part by the following facts: (1) the conquest coincided in time with the Hildebrandine triumph, which made the influence of Rome more powerful in all parts of the ecclesiastical realm, and (2) what is still more important, the Conqueror carried through his most important reforms by the aid of Norman ecclesiastics, many of whom were essentially lawyers rather than theologians. To these men, the most distinguished of whom was Lanfranc, the civil procedure was familiar, while that of the common law was not understood. They had sufficient influence with the Emperor to cause the separation of the bishops' courts from the sheriffs' courts, and in the former the civil law methods were adopted. They were also promised the assistance of the royal power in enforcing the decisions of the ecclesiastical courts. Thus the ecclesiastical jurisdiction was soon in full swing, with foreign bishops substituted for the native bishops, and the consequent change from customary procedure to that of the civil law.

The legal basis of the independent ecclesiastical jurisdiction in England is to be found in an ordinance of William I bearing date of 1070. In this ordinance it is prescribed that in the future cases "quae ad regimen animarum pertinent" are to be tried not in the temporal court but in the bishop's court. Obedience to the summons of the ecclesiastical courts was compulsory and would be enforced by the secular power, if need be. In such general terms is the subject-matter for ecclesiastical jurisdiction stated in this ordinance that a rapid extension of the jurisdiction was a very easy matter, particularly when aided by royal influence.

The next important step in the development of the ecclesiastical jurisdiction was the exemption of the clergy (clerks) from temporal jurisdiction; this came during the reign of Stephen. Though not so at first, this exemption was soon made to apply to all who could read and write. With all clerks amenable to the ecclesiastical courts only, and with all who could read and write entitled to be considered clerks we have a considerable extension of the ecclesiastical at the expense of the secular courts. During several succeeding reigns the race between the secular and the ecclesiastical courts proceeds with no small degree of vigor and bitterness. The former strove consistently to confine the ecclesiastical courts to such limits as would seem compatible with an orderly administration of law, and the latter strove with equal persistence to extend their jurisdiction both with respect to the persons and the causes cognizable. By degrees the matters over which there was a dispute as to which courts should have jurisdiction became extraordinarily numerous. Henry II, who was one of the greatest reformers in matters of law and administration, attempted by the Constitution of Clarenden (1164) to clear matters up, but did not obtain the recognition of the church. Hence he had in some measure, in the compromises of 1172 and 1176, to yield to ecclesiastical pretensions. From the middle of the twelfth century onward for about four centuries the heads of the church bombarded the King with an almost unbroken series of petitions setting forth the various points wherein they desired a change in the procedure of the secular courts. Usually the King gave answer to each point singly, and gradually the church accustomed itself to act upon these answers.

A stage in the development of ecclesiastical jurisdiction was marked by the so-called statute Circumspecte Agatis, which was really an instruction of Edward I to his judges, issued in 1285. Of even greater importance were the Articuli Cleri, of 9th Edward II. These were royal letters patent containing a clerical petition and the answer to it by the King and his council. The decisions laid down in these documents settled the more vital points at issue, but the controversy was not wholly stayed. In the subsequent stages of this controversy we find within the next two centuries two important landmarks: the Act of the 18th of Edward III (1344) and the Charter of Edward IV (1462).

Among the personages in this controversy between church and state, the central figure on the side of the Canonists, and in fact the founder of Mediæval Canonical Jurisprudence in England was Theobald, who ruled the church from 1139 to 1161. He was also the patron of Thomas à Becket. As secretary to Archbishop Theo-

bald, John of Salisbury, the philosopher and historian, was the ancestor of the diocesan chancellor and vicars-general who begin to execute with more regularity and intelligence the Canonical Law.

A considerable part of the work of John of Salisbury was concerned with the question of appeals. Under the encouragement of Henry of Blois a great part of the letters written by the secretary in the name of Theobald dealt with this question and with the rights of advowsons. But this was not all. In the year 1149 Theobald brought from Lombardy and settled at Oxford as a teacher of law Master Vacarius, who had given his life to the study of the Code and Digest, and had drawn up handbooks of procedure sufficient to settle all the questions of the law schools. But Vacarius's path was not entirely smooth, for, in addition to the conservatism of the English, and the national prejudice in favor of the common law, Stephen, the reigning king, set himself steadfastly against the innovation, and ended the controversy by expelling Vacarius. Accordingly the Civil Law was for the time banished.

It is curious that both Prynne and Selden, not to mention Coke, have confounded the teachings of Vacarius with the Canon Law. Now, while there is no doubt but that had Vacarius been allowed to go on uninterrupted the fruits of his labors would have had an influence upon the development of the Canon Law in England, it is certain that what Vacarius taught was the Corpus Juris Civilis.

Although Bologna could not come to England, England might go to Bologna. As a result of these migrations, the legal scholars in England were learned in both the Civil and the Canon Law; and from this fact comes the extremely close connection between the two systems of law recognized in the degree of J. U. D. (Utriusque Juris Doctoratus). But however strongly these systems of law might appeal to the scholars, they did not appeal with equal force to either the English kings or the English people. Therefore they did not take root in England. They were condemned by the sagacious Henry II as well as by the stubborn Stephen. The former, in his assize of darrein presentment, transferred to the common law courts all questions of advowsons and presentations, the cognizance of which by the ecclesiastical courts was a source of constant appeal to Rome. By a letter to the Lord Mayor of London, dated Dec. 11, 1234, he directed that no one should be allowed to hold law schools in London or teach the Canon Law.

Notwithstanding this royal and popular opposition there was introduced in 1236 the Codex Receptus of canon law, and during the reign of Edward III a new code of canon law by John of Ayton. This latter code included annotated statutes of Otho and Othoban.

The natural result of these codes was to give to the canon law a fixedness and certainty throughout England, not possessed by the customary or common law.

At the high tide of their power the ecclesiastical courts had jurisdiction, or at least claimed that they had jurisdiction, over every thing which had to do with the souls of men, over the clergy in matters civil and criminal, all suits to which clergymen were a party or which involved questions of title to ecclesiastical property, authority over the beliefs and morals of the laity, exclusive jurisdiction over marriage and wills, jurisdiction for correction of life "*pro salute animae,*" and under this claim they attempted to regulate the layman's relation to his servants, secure his attendance at church, make him pay his debts, observe his oaths, etc.

But it must not be supposed that at any time they exercised these powers without protest from the common law courts. Under the lead of such champions of the common law as Coke and Glanville the pretensions of the ecclesiastical courts were most strenuously and ably resisted; yet it was not until the reign of Henry VIII that the ecclesiastical courts were subordinated to those of the common law. Henry's divorce case was the occasion but not the cause of the clash. For, unless the love of freedom which is deep-rooted in the Anglo-Saxon were to yield to opposition, the issue would sooner or later have to be forced, for the supremacy of ecclesiastical over civil courts is incompatible with individual liberty. Of this the experience of England, to say nothing of that of other countries, was amply convincing. While, therefore, a less inordinate zeal upon the part of Henry VIII for making an extensive collection of wives might have postponed, it could not have prevented, the "irrepressible conflict."

In this struggle we find four fairly well defined periods: (1) from the conquest in 1066 to the death of Henry III in 1272. This period is characterized by a steady retreat of the civil power before the superior might of the church, a retreat which was retarded but not permanently checked by the best kings. (2) From the beginning of the reign of Edward I, 1272, to the end of the reign of Richard II, 1399. During this period the State asserts its rights and endeavors, without open war, to restrict the jurisdiction of the ecclesiastical courts within limits consistent with the welfare of the body politic. (3) From the beginning of the reign of Henry IV, 1399, to that of Henry VIII, 1509. This is a period of comparative peace. The State was too busy with foreign wars to give much attention to anything else, and the clergy was so much split up into factions that it could not force the issue, as each of the factions was striving for royal favor. (4) The reign of Henry VIII. In this period the

supremacy of the common law courts is definitely established, so definitely that it is exceedingly unlikely that the issue will ever again be raised in England. As a result of the struggle the contention of Coke that "the expounding of statutes that concern the ecclesiastical government or proceedings belongeth unto the temporal judges," became an assumed fact.

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CONSTITUTIONAL LIMITATIONS ON PRIMARY ELECTION LEGISLATION*

IN determining what aspect of the general question I should discuss in the brief time available, it seemed to me desirable that I should confine my attention to the constitutional aspect of the matter, leaving the discussion of the practical workings of the various laws actually enacted to those who have had more opportunity to observe them. The constitutional side of the matter has already been very ably discussed by Professor Tuttle in MICHIGAN LAW REVIEW,[1] and I do not hope to add materially to what is there said, though certain of the questions may be approached in a somewhat different way.

In dealing with this constitutional aspect it is necessary to observe at the outset, that with very few exceptions, our constitutions are entirely silent upon the question of conventions, caucuses, and nominations. The whole question is so new that most of the existing constitutions, like that of Michigan, which went into effect in 1851, were enacted before the present interest in the matter had arisen. Under these circumstances, then, in most States, if any constitutional limitations exist they must be deduced from provisions of the constitution directed more immediately to other matters.

In California, however, since this question first arose, so many constitutional difficulties were found to be in the way of desired legislation[2] that the constitution has been amended so as to confer

*A paper read before the Michigan Political Science Association, on February 10, 1905. This meeting of the Association was devoted entirely to the consideration of the various aspects of primary election legislation.

[1] 1 MICHIGAN LAW REVIEW, 466.

[2] See Spier *v.* Baker, 120 Cal. 370, 52 Pac. 659; Britton *v.* Board of Commissioners, 129 Cal. 337, 61 Pac. 1115; Marsh *v.* Hanly, 111 Cal. 368.